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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-515

AMERICAN SECURITY COUNCIL EDUCATION FOUNDATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
and
UNITED STATES OF AMERICA,
Respondents,

CBS, INC.,
Intervenor.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMERANDUM OF PETITIONER

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On September 29, 1979, Petitioner filed its Petition for a Writ of Certiorari in this case and on November 16, CBS filed a Brief in Opposition. On December 7, a Brief in Opposition was filed by the Solicitor General on behalf of the Government and the Federal Communications Commission. The instant Reply is directed to matters raised in those oppositions.

Both the Government and CBS claim that "National Security" is an unacceptable term to use in defining a complaint under the fairness doctrine. To illustrate the unacceptability of the term, both refer to an example of a news story relating to "Chinese School Children" (CBS brief at 5, Government's brief at footnotes 4 and 5) as indicative of

a problem of mis-classification used in petitioner's study while complaining generally of the basic Viewpoint Analysis used by Petitioner in its study.

First of all, as to the general subject of "National Security," we would note that the Commission itself has referred to "the question of US-USSR military relations" as a controversial issue covered by the fairness doctrine[1] and as recently as November 15, 1979, issued a *Memorandum, Opinion and Order* in Docket No. 78-331 (FCC 79-278) in which it repeatedly used the *very term* "national defense and security." It therefore appears that the Commission's (and CBS's) ability to deal with or understand the meaning of that term varies to suit their purpose.

As to the basic methodology used in Petitioner's complaint it was noted to the Commission and to the Court below that it was basically the same analysis as used by the Brookings Institution in analyzing the U.S. budget (as further described at footnote 3, page 114A of the Appendix) and, as such, had been found to be a legitimate and reliable means of analysis. The attempt by both the FCC and CBS to denigrate the entire study and analytical process by questioning the classification of a single news story referring to "Chinese School Children" illustrates rather than explains the problem. If there *were* a basic flaw or defect in the methodology of the complaint, it would certainly have been appropriate for CBS to point it out in responding upon the merits. It is *not* appropriate, however, for either the FCC *or* CBS to search through the mass of research and data included in the several hundred page complaint to seize upon any individual item which when taken out of context and without further explana-

[1]Letter of FCC to *Gaylord Broadcasting Co.*, April 20, 1977 cited at footnote 42, page 127A of the Appendix.

tion would be referred to as representing some "fatal flaw" vitiating the entire study and analysis.[2] By the very action of the FCC in blocking the requirement of a response from CBS, a forum to examine any legitimate complaints or response by CBS to any part of the substance *or* methodology of the study was effectively denied. CBS may sincerely believe it could refute the study. Petitioner believes otherwise. But the action of the FCC in refusing to carry out its obligation to process complaints under the fairness doctrine has denied *everyone* an answer on the merits and substance of this most important question.

Lastly, it should be noted that the *Notice of Inquiry* referred to in Petitioner's Brief at page 17, has been completed and by *Report and Order* released November 9, 1979[3], the FCC has rejected consideration of "access" or "first-come, first-served" proposals as substitutes for the the Fairness Doctrine and has instead re-affirmed its intention to continue to rely upon the Fairness Doctrine as the sole vehicle and remedy available to the public in cases of broadcast bias. As such, the instant case is of substantial importance since it relates to the very application or non-application of that remedy by the Federal Communications Commission.

In summary, no argument by the FCC or by CBS has changed the basic question presented in this case. Was the complaint filed by the petitioner, on its face, so frivolous, so vague, and so imprecise that its meaning could not be

[2]The relevance of this particular news item was addressed by Judge Wilkey in the Panel's Decision at footnote 46, page 129A of the Appendix.

[3]*In Re Handling of Public Issues Under the Fairness Doctrine* Docket No. 78-60, Report and Order, FCC 79-706.

discerned with sufficient precision to inform the FCC of the seriousness of the charge *or* to enable CBS to frame a response? If so, then the Commission could properly claim that it had a duty to step in and protect CBS from attempting the impossible. If, on the other hand, the complaint *was* sufficiently precise to convey its meaning to people of reasonable intelligence, then petitioner respectfully submits that the FCC acted improperly in attempting to insulate CBS from considering and responding to the merits of the complaint, and that the action by the Commission represents such a fundamental denial of First Amendment rights to the Petitioner and to the public at large, that it requires correction by this Honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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